Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.,
Plaintiffs
Petitioners

v.

FREDERICK BITZER, CHAIRMAN, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

CARL R. AJELLO
Attorney General

BERNARD F. McGOVERN, JR.
Assistant Attorney General

SIDNEY D. GIBER
Assistant Attorney General

February 19, 1976

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. The Eleventh Amendment Bars the Granting of Retrospective Monetary Damages Against the State by a Federal Court 4

II. The State of Connecticut Has Not Waived Its Immunity Under the Eleventh Amendment 10

III. Petitioners' Arguments Are Not Supported by Law 15

IV. The Enactment of the Fourteenth Amendment Has Not Limited the State's Eleventh Amendment Immunity to the Extent that It Permits an Order for Retrospective Damages to Be Awarded Against a State 16

CONCLUSION 19

TABLE OF CASES

CASES: *Page*

Anderson v. *Tennessee Office of Economic Opportunity*, 384 F.Supp. 788, 790 (M.D. Tenn., 1974) 8

Bergner v. *State*, 144 Conn. 282, 286, 130 A.2d 293 (1957) 13

Chandler v. *Dix*, 194 U.S. 590, 24 S.Ct. 766 (1903) 12

Edelman v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974) 5, 6, 7 12, 16

Employees of Department of Health and Welfare v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973) 4

Employees v. *Dept. of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614 (1973) 15

Ex Parte Young, 209 U.S. 123 (1908) 7

Fidelity Bank & Trust v. *State of Conn.*, 166 Conn. 251, 255, —— A.2d ——, (1974) 13

Fitzpatrick v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975) 6, 15, 16, 19

Great Northern Life Insurance Co. v. *Read*, 322 U.S. 47, 64 S.Ct. 873 (1944) 12

Heart of Atlanta Motel v. *United States*, 379 U.S. 241, 85 S.Ct. 348 (1964) 15

Katzenbach v. *McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964) 15

Parden v. *Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207 (1964) 15

Petty v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785 (1959) 15

Page

Richin v. *Industrial Construction Inc.*, 502 F.2d 1051, 1055 (10th Cir. 1974) 12

Smith v. *Reeves*, 178 U.S. 436, 20 S.Ct. 919 (1899) 12

United States Constitution and Statutes:

U.S. Constitution, Article I, Section 8, Clause 3 2

U.S. Constitution, Amendment XI 3, 5, 6, 10, 11, 12, 13, 14, 16

U.S. Constitution, Amendment XIV 2, 13, 16

28 U.S.C. § 1254(1) 1

Title VII — Civil Rights Act of 1964 As Amended 2

State Constitution and Statutes:

Connecticut Constitution, Article XI, Section 4 10

Conn. Gen. Stat. — § 4-142 11

Conn. Gen. Stat. — § 52-566 13

Conn. Gen. Stat. — Chapter 53 ..... 11, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.,
Plaintiffs
Petitioners

v.

FREDERICK BITZER, CHAIRMAN, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals of June 2, 1975 is reported at 519 F.2d 559. The opinion of the District Court of September 16, 1974 is reported in 390 F.Supp. 278 (D. Conn. 1974). Both opinions were printed in the appendix of respondent Bitzer in his Petition for Writ of Certiorari in No. 75-283 (hereinafter App. as distinguished from the Appendix, hereinafter A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1975. Jursidiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Eleventh Amendment prohibit a federal court from awarding back pay monetary relief against a state, in favor of employees of that state who established that they were victims of discriminatory state laws which violated Title VII of the 1964 Civil Rights Act as amended in 1972?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article 1, Section 8, Clause 3 to the Constitution provides

that the Congress shall have the Power . . . "To regulate Commerce . . . among the several States . . ."

STATEMENT OF THE CASE

The Respondents accept the Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the Constitution of the United States as a bar to the awarding of retrospective damages by a federal court against a state. The doctrine of *Ex Parte Young* states that the Eleventh Amendment is not a bar to a suit to enjoin enforcement by a state officer of an unconstitutional state statute. However, *Ex Parte Young* is not authority for a retroactive award of monetary damages payable out of the State treasury. This Court, in *Edelman* v. *Jordan*, held such a retroactive award of monetary relief in favor of a private person against a state by a federal court was prohibited by the Eleventh Amendment.

The State of Connecticut has not waived its immunity under the Eleventh Amendment. This Court has held that a waiver must be in the clearest language and that constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.

The Petitioners' arguments are not, in fact, supported by law. The Petitioners in actuality propose that Congress has the power to withdraw the Eleventh Amendment. They further argue that the Fourteenth Amendment has limited the State's Eleventh Amendment immunity. They fail to recognize that it is the duty of the courts to reconcile and give effect to both amendments insofar as is possible.

ARGUMENT

I.

THE ELEVENTH AMENDMENT BARS THE GRANTING OF RETROSPECTIVE MONETARY DAMAGES AGAINST THE STATE BY A FERERAL COURT.

Mr. Justice Marshall and Mr. Justice Stewart, in concurring with the majority opinion in *Employees of Dept. of Health and Welfare* v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973) briefly reviewed the subject of a state's immunity to suit and wrote:

> "Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence. [footnote omitted]. While the present-day immunity of a state from suit by its own citizens or by citizens of another State in the absence of consent cannot be justified on the common-law rationale that 'the King can do no wrong,' the principle has been said to be applicable to the states because of '[t]he inherent nature of sovereignty,' Great Northern Life Insurance Co., v. Read, 322 U.S. 47, 51, 64 S.Ct. 873, 875, 88 L.Ed. 1121 (1944). See also Kawanana Koa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed 834 (1903).
>
> "The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a State by one of its citizens, absent consent. But that doctrine was modified pro tanto in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing they simultaneously subjected to Congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.
>
> This is one of the essential lessons of the decision in Parden v. Terminal R. Co., 377 U.S. 184, 192, 84 S.Ct. 1207, 1212, 12 L.Ed. 233 (1964), where the Court recognized that '[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.' Congress having validly exercised its power under the commerce clause to extend the protection of the FLSA to state employees such as petitioners, see Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed. 2d 1020 (1968), the State may not defeat this suit by retreating behind its common law shield of sovereign immunity." *Id.*, 411 U.S. at 288, 93 S.Ct. at 1619.

In *Edelman* v. *Jordan*, 415 U.S. 651, 662 94 S.Ct. 1347, 1358 (1974) this Court, while examining the history of the Eleventh Amendment, stated:

> "While the Amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in Federal courts by her own citizens as well as by citizens of another state. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); Duhne v. New Jersey, 251 U.S. 311 40 S.Ct. 154, 64 L.Ed. 280 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1945); Parden v. Terminal R. Co., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 233 (1964); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973). It is also well established that even though a State is not named a party to the action, the suit may

nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), the Court said:

'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' *Id.*, at 464, 65 S.Ct., at 350.

"Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573, 66 S. Ct. 745, 90 L.Ed. 862 (1946)."

In *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975) the Court of Appeals, after reviewing the history of the Eleventh Amendment, continued:

> "On the other side of the coin, the Eleventh Amendment does not bar a suit to enjoin enforcement by a state officer of an unconstitutional state statute. Ex Parte Young, 209 U.S. 123 (1908). The Court, in reaching this result, relied on the common law principle that a state officer acting illegally is deemed to act 'without the authority of' the state and therefore outside its shield of sovereign immunity. 209 U.S. at 159-60. Furthermore, although the Eleventh Amendment shields the state against a retroactive award of monetary damages payable out of the state treasury as compensation for its past breach of a legal duty, a judgment requiring a state to expend some public funds in connection with obtaining or implementing injunctive relief against it is permissible, even though the award in such a case has 'an ancillary effect on the state treasury'. Edelman v. Jordan, 415 U.S. 651, 688 (1974); Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974)." *Fitzpatrick* v. *Bitzer, supra,* App. 33a.

This Court, in *Edelman,* stated that, as in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young,* 209 U.S. 123 (1908) will not, in many instances, be that between night and day. *Supra* at 667, 94 S.Ct. at 1357. However, the difference presented for this Court's consideration in the matter presently before it is not gray at all. In this case we have the petitioners seeking an award of back pay against a state.

This Court, in *Edelman,* held that such retroactive award of monetary relief against a state was in contravention of the Eleventh Amendment.

"But that portion of the district court's decree which petitioners challenge on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioners were under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable from an award of damages against the state. It will to a virtual certainty be paid from state funds, and not from the pocket of the individual state official who was the defendant in this action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

"Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in Ford Motor Co. v. Department of Treasury, supra. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana State officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the state pursuant to an allegedly unconstitutional tax exaction. Yet this court had no hesitation in holding that the taxpayer's action was a suit against the state and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." *Id.*, at 668, 94 S.Ct. at 1358.

In *Anderson* v. *Tennessee Office of Economic Opportunity*, 384 F.Supp. 788, 790 (M.D. Tenn. 1974) wherein the District Court correctly implemented *Edelman*, the District Court wrote:

> ". . . The history of the Eleventh Amendment is rather complex and confusing. [footnote omitted]. The force of the Eleventh Amendment has been eroded considerably by the use of two legal fictions: (1) suing the state's officials, rather than the state itself, and (2) finding that the state has waived its immunity or consented to the suit.
>
> "The legal fiction of suing the state's officials germinated in the controversial case of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), where the Supreme Court held that where

> '[t]he act to be enforced is alleged to be unconstitutional . . . the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.'
>
> "However, even where the fiction of suing the state officials, rather than the state itself, successfully avoids an Eleventh Amendment bar to the suit, it has been held that only prospective injunctive relief can be granted, absent the presence of waiver or consent by the state. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974). See also, Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), and Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974). The Edelman court, overturning a judgment which ordered retroactive payment of public aid benefits wrongfully withheld by state officials, quoted with approval from Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945):
>
> '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' At 464, 65 S.Ct. at 350, 89 L.Ed. at 394.
>
> "The Edelman court disapproved the Eleventh Amendment holdings of prior cases 'to the extent that they are inconsistent with our holding today.' Included in this disapproval was the case of Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969), which allowed retroactive payment of welfare benefits found to have been unlawfully withheld because of residence requirements which were held violative of equal protection.

"From the foregoing, it would appear that the Eleventh Amendment bars the way to the recovery in federal court of any retroactive benefits or attorney's fees under 42 U.S.C. § 2000e, unless waiver or consent to suit can be found. As the Supreme Court said in Employees v. Missouri Public Health Department, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973): 'The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State.' At 284, 93 S.Ct. at 1617."

II.

THE STATE OF CONNECTICUT HAS NOT WAIVED ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT.

The Constitution of the State of Connecticut, Eleventh Article, Section 4, states:

> "Claims against the state shall be resolved in such manner as may be provided by law."

It cannot be argued that this constitutional provision is a waiver of the Eleventh Amendment to the Constitution of the United States. It grants the General Assembly of the State of Connecticut the authority to determine if, when and how claims against the state shall be made.

The General Assembly has adopted several statutes which permit the institution of actions against the state or against certain state officials. None of these statutes is applicable in the matter presently before the Court.

One of the areas in which claims against the State of Connecticut may be resolved is set forth in Chapter 53 of the

Connecticut General Statutes entitled "Claims Against The State". This statute specifically excludes "claims for the periodic payment of disability, pension, retirement or other employment benefits". Sec. 4-142 Conn. Gen. Stat., as amended.

The cause of action now before this court was based upon certain claims for retirement benefits. The statute authorizing the appointment of the Claims Commissioner for the State of Connecticut specifically excludes the consideration of claims concerning retirement benefits from the jurisdiction of the Claims Commissioner.

The deliberate exclusion of this area from the jurisdiction of the official empowered to hear claims and to authorize the institution of actions against the state, must be considered to be a positive refusal by the state to waive its immunity in all areas not specifically waived by the statute.

Assuming even that the passage of Chapter 53 of the Connecticut General Statutes does not serve to state that the State of Connecticut has not waived its Eleventh Amendment immunity, it is not necessary for a state legislature to pass a statute or resolution which will specifically cry out "Know Ye All Men by these presents that the State of Connecticut does hereby refuse to waive its immunity under the Eleventh Amendment of the Constitution of the United States of America".

It is almost axiomatic that in the construction of statutes a state agency has no authority other than that granted it by statute or by necessary implication. It follows that the actions of the state are read in its statutes or by necessary implication. Thus, a state legislature must speak in the clearest of terms when the decision is being made to waive the immunity of the state.

A waiver must not only be clearly intended as a waiver, but there must be an appropriation of funds to implement the waiver. Any waiver of Eleventh Amendment immunity without an appropriation to permit the payments involved is an incomplete act and should not be considered as an absolute waiver.

This Court has stated that in determining whether a state has waived its constitutional protection under the Eleventh Amendment, it would require that the waiver be in the clearest possible language and that it would not adopt a ruling by which it is found that a state constructively consented to the institution of a suit.

> ". . . Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1945) (footnote omitted). '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration to a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Edelman* v. *Jordan, supra,* at 673, 94 S.Ct. at 1360. See also, *Smith* v. *Reeves,* 178 U.S. 436, 20 S.Ct. 919 (1899); *Chandler* v. *Dix,* 194 U.S. 590, 24 S.Ct. 766 (1903); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 64 S.Ct. 873 (1944); *Richin* v. *Industrial Construction Inc.,* 502 F.2d 1051, 1055 (10th Cir. 1974).

Chapter 53, Connecticut General Statutes, does not state that the State of Connecticut consents to suit in the federal courts. There is no statutory indication that Connecticut has waived its right to raise the protection of the Eleventh Amendment; a waiver of Connecticut immunity from suit must be effected only by express action of the Connecticut General Assembly. *Fidelity Bank & Trust Co.* v. *State of Conn.,* 166 Conn. 251, 255, —— A.2d ——, (1974); *Bergner* v. *State,* 144 Conn. 282, 286, 130 A.2d 293 (1957). Chapter 53 merely provides a procedure for obtaining authorization to sue the state in the state courts only.

The fact that when the State of Connecticut deems it appropriate it waives its sovereign immunity "by the most express language" is admirably demonstrated by § 52-556, Connecticut General Statutes, which states:

> "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

There is no Connecticut General Statute or Resolution of the State Legislature stating that the State of Connecticut has waived its immunity under the Eleventh Amendment of the Constitution of the United States.

The court below, in determining that the State of Connecticut had not waived the Eleventh Amendment or consented to the institution of the action by the adoption of the Fourteenth Amendment, stated:

> "Although we must conclude that Congress authorized private damage suits against the states for violation of Title VII, we reject any suggestion that an inference of

voluntary waiver or consent may be drawn from the state's mere continuance of its governmental function of hiring employees to perform state duties and of providing for their working conditions, including retirements. It is obvious that Connecticut, which had engaged in these activities as an essential part of its functions long before Title VII was amended to include the states, would, regardless of the amendment, have no choice but to continue doing so thereafter or cease functioning as a state. Thus no basis exists for finding voluntary waiver. Cf. Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938). See Note, Private Suits Against States in Federal Courts, 33 U. Chi. L.Rev. 331, 336 (1966). Although its continued engagement in these activities might conceivably be labelled a 'constructive' consent, the Supreme Court in Edelman v. Jordan, 415 U.S. 651, 673 (1974), stated that '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.'

"Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), relied upon by plaintiffs, is clearly inapposite. There the State of Alabama, in face of the fact that interstate railroads were subject to the Federal Employees Liability Act, 45 U.S.C. §§ 51, et seq., and had been subjected to extensive regulation by Congress, see California v. Taylor, 353 U.S. 553 (1957) (state-owned railroad subject to Railway Labor Act); United States v. California, 297 U.S. 175 (1936) (same subject to Federal Safety Appliance Act), undertook the operation of such a railroad, which was essentially a proprietary business. In these circumstances a finding of voluntary waiver of constitutional immunity from suit was fully justified. No such situation exists here.

Connecticut's employment of its employees and adoption of a retirement system had long predated Title VII." *Fitzpatrick* v. *Bitzer, supra,* App. 41a.

III.

PETITIONERS' ARGUMENTS ARE NOT SUPPORTED BY LAW.

The petitioners argue that Congress intended to authorize suits for employment discrimination by state employees against states, together with all equitable remedies, including back pay. He states that *Employees* v. *Dept. of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614 (1973) has been "overruled" by Congress. We note merely that Congress has no power to withdraw the Eleventh Amendment immunity from the states.

The petitioners argue that recent decisions of this Court indicate that a state may be rendered liable to suit in federal court and that the appropriate circumstances are present in this case. Petitioners cite as authority *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 85 S.Ct. 348 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294, 85 S.Ct. 377 (1964); *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785 (1959); and *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 84 S.Ct. 1207 (1964). Each case is not applicable in the matter presently before the Court. The State of Connecticut was not engaged in any profit making venture or any activity which could be reached by stretching the Commerce clause. The State was engaged in the every day business of a sovereign: It was governing, it was hiring, and it was paying its employees who are necessary in fulfilling its function as a sovereign.

IV.

THE ENACTMENT OF THE FOURTEENTH AMENDMENT HAS NOT LIMITED THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT THAT IT PERMITS AN ORDER FOR RETROSPECTIVE DAMAGES TO BE AWARDED AGAINST A STATE.

The petitioners argue that the State, by adopting the Fourteenth Amendment, has repealed or waived the Eleventh Amendment and further argue that *Edelman* does not decide the present case.

The United States Court of Appeals in deciding *Fitzpatrick* v. *Bitzer* stated:

"To the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, our duty is to reconcile and give effect to both amendments insofar as possible. See Prout v. Starr, 188 U.S. 537, 543-44 (1903). Observing that 'particularly after the Civil War, Congress undertook to make federal courts the primary guardians of constitutional rights,' Justice Brennan in his separate opinion in Perez v. Ledesma, 401 U.S. 82, 106 (1971), recognized that 'Ex Parte Young was the culmination of efforts by this Court to harmonize the principles of Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.' Edelman v. Jordan, supra, must be read as reaffirming the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh. See 415 U.S. at 666-69; The Supreme Court, 1973 Term, 88 Harv. L.Rev. 41, 247 (1974).

"This desirable balance should not be upset in the context of suits to enforce Fourteenth Amendment rights unless other means that might be made available for enforcement of rights under that Amendment are so ineffective that Congress, in promulgating the Fourteenth Amendment after its adoption by more than three-quarters of the Union, necessarily implied that the Eleventh Amendment's remedial bar to a damage action against a state must yield. There is no reason to find such a necessary implication, however, since Congress, under the balance as reaffirmed in Edelman, has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights.

"The prospective injunctive relief available under Ex Parte Young, if it stood alone, should offer adequate relief as a remedy for enforcement of Fourteenth Amendment rights against the states. However, other remedies either are or may be made available. The Eleventh Amendment presents no bar to a suit by the United States against a state, United States v. Mississippi, 380 U.S. 128 (1965). Congress can authorize a suit by the federal government on a private plaintiff's behalf and it has done so in Title VII. See 42 U.S.C. § 2000e-5(f)(1). A suit by the United States against a state to recover back benefits on behalf of persons protected by a federal statute is permissible. Brennan v. State of Iowa, 494 F.2d 100, 104 (8th Cir. 1974); see Department of Employment v. United States, 385 U.S. 355 (1966).

"Furthermore, although Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts, it might have done so. State courts would have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment,

which restrict only federal judicial power. We need not consider whether Congress could, consistently with the Tenth Amendment, compel a state to permit its citizens to enforce their Fourteenth Amendment rights against it in its courts except to note that under the Supremacy Clause and the general principle that state courts are co-equal partners with the federal courts in the enforcement of federal law, see Employees v. Department of Public Health and Welfare, 411 U.S. 279, 298 (Marshall, J., concurring); Martin v. Hunter's Lessee, 1 Wheat, 304, 339-50 (1816), state courts have been obligated to entertain congressionally-authorized private suits where state court jurisdiction extends to suits of the same character, see Testa v. Katt, 330 U.S. 386 (1947).

"Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in Edelman. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in Edelman suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n.2, the majority in that case expressly overruled Shapiro v. Thompson, 394 U.S. 618 (1969), State Department of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972) (per curiam), and Wyman v. Bowens, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed per curiam on the basis of Edelman a dismissal of plaintiff's claims to back wages from the state based on equal protection and due

process, although without considering the arguments presented here. Further see Skehan v. Board of Trustees, 501 F.2d 31, 42 n.7 (3d Cir. 1974); Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975)." *Fitzpatrick v. Bitzer, supra,* App. 44a.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below concerning the retroactive payment of monetary damages be sustained.

Respectfully submitted,

CARL R. AJELLO
Attorney General

BERNARD F. McGOVERN, JR.
Assistant Attorney General

SIDNEY D. GIBER
Assistant Attorney General